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In the Supreme Court of the United States

OCTOBER TERM, 1985

GARY JACKSON, a/k/a ROE

v.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the Confrontation Clause bars the prosecution from introducing statements falling within the co-conspirator exception to the hearsay rule (Fed. R. Evid. 801 (d) (2) (E) where the prosecution fails to establish that the declarant is unavailable to testify at trial.

2. Whether the Compulsory Process and Confrontation Clauses of the Sixth Amendment and the Due Process Clause of the Fifth Amendment were violated by the prosecution's refusal to assist in the production of a confined witness and the trial court's failure to act upon the Defendant's application for a Writ of Habeas Corpus and Testificandum.

3. Whether the Due Process Clause requires that a hearing be held outside the hearing of the jury to determine the admissibility of various admissions by a co-conspirator in a proceeding separate and apart from the jury trying guilt or innocence.

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OCTOBER TERM, 1985

GARY JACKSON, a/k/a ROE, PETITIONER

v.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The Defendant, Gary Jackson a/k/a Roe, by and through Counsel, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINION BELOW

The opinion of the Court of Appeals (App., *infra*) is reported at 757 F.2d 1486.

JURISDICTION

The judgment of the Court of Appeals was entered on March 21, 1984. The order denying rehearing was entered on May 30, 1985 (App., *infra*). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISIONS AND RULES INVOLVED

The Fifth Amendment states:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases rising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger, nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law, nor shall private property be taken for public use, without just compensation.

The Sixth Amendment provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

Rule 801(d) of the Federal Rules of Evidence provides in pertinent part:

> A statement is not hearsay if—
>
> * * * * *

(2) * * * The Statement is offered against a party and is * * *, or (E) a statement by a co-conspirator of a party during the course and in furtherance of the conspiracy.

Rule 104(a) of the Federal Rules of Evidence provides:

Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court, subject to the provisions of subdivision (b). In making its determination it is not bound by the rules of evidence except those with respect to privileges.

Rule 104(c) of the Federal Rules of Evidence provides:

Hearings on the admissibility of confessions shall in all cases be conducted out of the hearing of the jury. Hearings on other preliminary matters shall be so conducted when the interests of justice require or, when an accused is a witness, if he so requests.

STATEMENT

On January 4, 1984, a grand jury in the Eastern District of North Carolina returned a five count bill indictment against the Defendant, Gary Jackson, also known as "Roe". The indictment alleged that "from on or about the 7th day of April, 1983, and continuously thereafter up to and including the 29th day of November, 1983, . . .the Defendant, willfully and knowingly did combine, conspire, confederate and agree to together with Michael Lynn Thompson. . .and with diverse other persons. . ." to possess marijuana with intent to distribute, and to distribute marijuana, and to illegally acquire and possesss food stamps.

In addition to the conspiracy offense, the Defendant was charged with knowing acquisition and possession of the food stamps without being authorized to do so under law or regulations, unlawful possesson of marijuana with

the intent to distribute it, distribution of marijuana, and the use of a communications facility to transact unlawful disposition of a controlled substance.

Defendant, Michael Lynn Thompson, was also charged in a separate indictment with conspiracy involving different dates. The government filed a motion to join the indictments for trial which was allowed.

A pretrial conference was conducted. At that conference, Christopher B. Godwin, attorney for the Defendant, Gary Jackson, appeared. Also, a conference was conducted involving counsel for Defendant, Michael Thompson. No record of any sort was taken or permitted to be made of the conference except the notes of the attorneys for the defendants.

Defense counsel was not advised by the government at the conference or appreciably prior to trial that Preston Lee Jackson, Defendant's nephew, would be alleged or contended to be a co-conspirator. Counsel was not told his statements would be offered as vicarious, co-conspirator admissions.

Prior to trial the Defendant filed a request for an evidentiary preliminary hearing to determine the admissibility of co-conspirator statements. Recognizing the Defendant's request as one for "James" hearing, the magistrate denied the motion on the ground that the Fourth Circuit has not yet adopted the *James* decision. The trial court similarly denied this motion for a preliminary determination on the record of admissibility.

On January 27, 1984, the Defendant served the prosecutor, with various motions. Among those motions was motion for a bill of particulars seeking, *inter alia*, the names and identities of any persons alleged to have been members of the conspiracy and a statement of the manner or means by which the conspiracy was contended to have occurred.

The government responded to the Defendant's motion

for a bill of particulars with a four page response in which it contended that the government had "supplied [defense counsel] with every essential detail regarding the charges against the Defendant." The government, further asserted, that the request for a bill of particulars was intended to obtain discovery and submitted "that the indictment . . . set out with clarity and specificity all of the particulars and material facts necessary to enable the Defendant to understand the charges against him . . ."

Without conducting a hearing to resolve the conflict between the government's assertions with respect to discovery and those of the Defendant, the magistrate denied the motion for a bill of particulars. Oddly, the order denying the motion for a bill of particulars was not received by defense counsel, and defense counsel raised the bill of particulars question before the court on February 22, 1984, prior to the commencement of the evidentiary portion of the trial. The trial court made no inquiry, either, at that time as to whether the conflict still existed between the government and defense counsel as to the discovery provided but simply, "based on the finding of the magistrate", denied the motion for a bill of particulars, including the request for the identities of persons alleged to be co-conspirators.

Jury selection commenced on February 21, 1984, in Wilmington, North Carolina. On February 27, 1984, the trial actually began with the presentation of evidence.

Immediately prior to beginning the evidentiary phase of the trial, defense counsel made a motion in limine to exclude statements by persons not specifically charged or alledge to be co-conspirators. The motion was denied.

Additionally, at the trial, Defendant objected to hearsay statements of Preston Lee Jackson upon the ground that their introduction denied Defendant his Sixth Amend-

ment right to confrontation and compulsory process and his guarantee of due process of law. After jury selection, and prior to the evidentiary portion of the trial beginning, defense counsel contacted the prosecutor's office to request assistance in obtaining the presence of Preston Lee Jackson at trial. That request was refused and Defendant was told that if he desired to have Preston Lee Jackson present, he would have to file a petition to do so. Defendant filed such a petition on the Friday prior to trial and brought the petition to the attention of the trial court. Rather than acting on the petition, the court sustained the Defendant's objection to the testimony, but later allowed the testimony to be introduced in the trial.

At trial, the government sought to introduce, and was successful, over the Defendant's objections and motions to strike, in introducing into evidence acts and declarations of Preston Lee Jackson to prove the Defendant's participation in the alleged conspiracy. Additionally, the government introduced evidence of the Defendant's actions and those of Preston Lee Jackson and Michael Thompson, as well as Preston Lee Jackson's statements on dates not alleged in the indictment, particularly, February 22, March 15, March 16, March 31, and April 1, 1983, of which the Defendant was not advised and did not have notice.

On the afternoon of February 29, 1984, the jury returned a verdict of guilty as to the Defendant, Jackson, on all counts. On appeal from the conviction, the Fourth Circuit Court of Appeals held that disclosure of the co-conspirator's statements should have been made, but ruled that neither the denial of the motion in limine, the request for a preliminary determination of admissibility outside the presence of the jury, and the motion for bill of particulars, nor the failure to act on the application for the writ of *habaes corpus ad testificandum* was an abuse of discretion. Similarly,

the government's failure to produce the co-conspirator or to show his unavailability was not such a violation as to constitute reversible error.

REASONS FOR GRANTING THE PETITION

This case presents a question of great practical importance to our criminal justice system. The conflict between the constitutionally mandated Confrontation Clause and the use of co-conspirator declarations is often very real. The interpretation and resolution of this conflict has sharply divided the Courts of Appeals and resulted in widely divergent and inconsistent opinions. This divergence of results can most recently be shown through this case and another, *United States v. Inadi,* 748 F.2d 812 (3d Cir. 1985), *cert. granted,* _____ U.S. _____ 53 U.S.L.W. 2318, No. 84-1580 (1985); wherein the Third Circuit, reversed a Defendant's conviction due to the government's failure to show that a co-conspirator was unavailable to testify and thus that his out-of-court statements were admissible.

In this case, *United States v. Jackson,* 757 F.2d 1486 (4th Cir. 1985), the Fourth Circuit Court of Appeals upheld the use of an absent co-conspirator's statements despite a showing that he was confined in a federal prison. The position of the Fourth Circuit conflicts with the recent opinion of the Supreme Court in *Ohio v. Roberts,* 448 U.S. 56 (1980); and that of the Ninth Circuit in *United States v. Ordonez,* 737 F.2d 793 (9th Cir. 1984).

In *United States v. Peacock,* 654 F.2d 339 (5th Cir. 1981); *cert. denied,* 464 U.S. 965 (1983). The Fifth Circuit reasoned that proof of the declarant's unavailability may be a constitutional prerequisite for admission of the co-conspirator's statements. The Court, however, found that such a showing had been made.

Other courts have concluded that statements which fall

within the co-conspirator rule satisfy the Confrontation Clause. *E.g., United States v. Kendall,* 665 F.2d 126 (7th Cir. 1981) *cert. denied,* 455 U.S. 1021 (1982); *United States v. McManus,* 560 F.2d. 747 (6th Cir. 1977); *cert. denied,* 434 U.S. 1047 (1978); *Ottomano v. United States,* 468 F.2d 269 (1st Cir. 1972) *cert. denied,* 409 U.S. 1128 (1973).

The Confrontation Clause does impose a requirement of showing a declarant's unavailability prior to the prosecution using his statements against the Defendant. *Ohio v. Roberts, supra; Mancusi v. Stubbs,* 408 U.S. 204 (1972); *Barber v. Page,* 390 U.S. 719 (1968).

In the case now before the Court, the Fourth Circuit allowed into evidence the alleged co-conspirator's statements despite the showing to the trial court that the co-conspirator was incarcerated in a federal prison. The prosecution had no intention of calling him to the stand, stating that fact to defense counsel immediately prior to trial. Upon learning at the time of trial that the prosecution was not calling the co-conspirator, the Defendant attempted to petition for a writ of *habeas corpus ad testificadum.* The trial court declined to grant the writ.

Quite naturally, the co-conspirator's statement is likely to be more presentable and palatable to a jury than the witness in the flesh. These niceties pale into insignificance, however, when compared to the mandate of the Confrontation Clause of the Sixth Amendment. Absent a showing of unavailability, which is not a great burden to the prosecution, the government should produce the declarant for cross examination. His production at trial would aid in the search for truth. To allow the prosecution to proffer statements, without requiring any showing of unavailability or governmental attempt to produce the declarant, does little to serve the cause of justice, particularly where as is shown in the record here, the objection is based on the fact that

the declarant was available and in the custody of the government.

2. In this case, as "in all criminal prosecutions, the accused . . . [was entitled to] enjoy the right . . . to be confronted with the witnesses against him [and] to have compulsory process for obtaining witnesses in his favor. . .". United States Constitution, amendment VI. The denial of the opportunity to face and confront the maker of inculpatory statements and the failure to afford the Defendant the means to procure a confined witness violates these Sixth Amendment rights. Additionally, the conduct of the prosecution in concealment or in making a witness unavailable violates the defendant's rights to due process of law. *See, Clark v. Blackburn,* 632 F.2d 531 (5th Cir. 1980).

While the Defendant does not contend that the right to confrontation is always coextensive with the hearsay rule and its exceptions; *see, e.g., Dutton v. Evans,* 400 U.S. 213 (1970); or that the right to complusory process is absolute; *see, e.g., Hoskins v. Wainwright,* 440 F.2d 69 (5th Cir. 1974); the Defendant asserts that these rights mandate a careful examination in each case to insure that the Defendant's right of confrontation is not abridged. *See, e.g., United States v. Puco, 476 F.2d 1099. (2d Cir. 1973), cert. denied,* 414 U.S. 844 (1973). *See also, United States v. Wright,* 588 F.2d 31, 38 (2d Cir. 1978) (unless a statement has sufficient indicia of reliability, then the prosecution should not be permitted to introduce out of Court statements into evidence under *Dutton* where the declarant is available and the Defendant has not had an opportunity to cross-examine).

The confrontation clause of the Sixth Amendment at a minimum was adopted to prevent the use of *ex parte* extrajudicial declarations in lieu of available witnesses in criminal trials. *Mattox v. United States,* 156 U.S. 237, 242 (1895). The clause affords a defendant the opportunity to

face his accuser, and allows the judge and jury to view the witness' demeanor to aid them in determining the reliability of the testimony. *Id.* at 242-43. *See also, Barber v. Page,* 390 U.S. 719, 722-25 (1968) (reversed armed robbery conviction where transcript of accomplice's confession was read at defendant's trial and state did not make good faith effort to produce accomplice); *Douglas v. Alabama,* 380 U.S. 415, 418 (1965) (reversed conviction for murder where extrajudicial confession of accomplice was read before jury and defendant unable to confront accomplice through cross-examination); *Pointer v. Texas,* 380 U.S. 400, 406-09 (1965) (reversed robbery conviction because defendant was denied the opportunity to confront an adverse witness when deposition of major witness was used by prosecution at defendant's trial).

> The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present the defendant's version of the facts as well as the prosecutions to the jury so it may decide where the truth lies. Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. *Washington v. Texas,* 388 U.S. 14, 19 (1967).

Deliberate concealment of a material witness is a deprivation of constitutional rights. *Lockett v. Blackburn,* 571 F.2d 309 (5th Cir. 1978), *cert. denied,* 439 U.S. 873 (1979) (United States Attorney's Office purchased airline tickets for witness and a police officer gave the two witnesses $130.00 in spending money, after which the witnesses left); *Freeman v Georgia,* 599 F.2d 65 (5th Cir. 1979), *cert. denied,* 444 U.S. 1013 (1980) (without approval by superiors, a police officer deliberately concealed a key witness, later marrying the witness). In such cases, a conviction cannot stand

and a new trial must be granted because the verdict was obtained without affording the defendant due process of law. Similarly, even the negligent concealment of a material witness or the prosecution's prevention of acquisition of such a witness at trial may constitute a denial of constitutional rights. *Id. Cf., Hernandez v. Estelle,* 674 F.2d 313, 317 (5th Cir. 1981) (by implication).

In *Motes v. United States,* 178 U.S. 458 (1900), the state introduced evidence of the prior recorded testimony of a witness that the prosecution did not produce at the trial to testify. The absent witness had been present within the territory. The government had, in fact, taken him into custody as a material witness before placing him in the custody of another witness from whom he escaped. Bacause the prosecution could have produced the witness had it maintained custody, pursuant to the court's ordinary process, the state was found to be negligent in failing to use means readily at its disposal to bring the witness into open court. Accordingly, the court held that the use of the out-of-court statement violated the defendant's right of confrontation. *Id.*

The decision of the Fifth Circuit Court of Appeals in *Hernandez v. Estelle,* 674 F.2d 313 (5th Cir. 1981), conflicts with the opinion of the Fourth Circuit Court of Appeals here. There, the state concealed its own witness and informant, Levine. The appellate court was "in the difficult position of determining the value of Levine's testimony without the benefit of the testimony itself. No one [knew]. . .what Levine would say should he suddenly appear." 674 F.2d at 316. However, looking at the circumstances of the record, the action of the prosecution and the possible reward for secreting a witness, the Court reasoned that "prejudice results when the absent witness' alleged testimony, circumstantially derived from and evaluated in context of the

entire record, would create a reasonable doubt of the defendant's guilt that did not otherwise exist." *Id.*

Neither the decisions from the United States Supreme Court nor other circuits have imposed a requirement that a defendant whose rights have been violated must also demonstrate that he could have impeached the statements of the witness to be confronted if he had been present, or that the secreted witness would have exculpated the defendant, as the Fourth Circuit held in this case. *See,* cases cited at page 10, *supra.* In the present case, the government had Preston Lee Jackson, an essential witness, in custody when it became clear that the government intended to rely upon the hearsay statements of Preston Lee Jackson. Defense counsel contacted the United States Attorney's Office. In the course of that discussion, defense counsel was informed that "Preston Lee Jackson was, in fact, in the custody of the United States. . .and requested the assistance [of the U.S. Attorney's Office] in obtaining the presence of Preston Lee Jackson at this trial. [Defense counsel was] informed that it was [first Assistant U.S. Attorney] Mr. McCollough's position" that his office would not assist in obtaining Jackson and that if the Defendant wanted Preston Lee Jackson present to confront him, he would have to file a Petition to do so. Defense counsel then filed a petition for writ of *habeas corpus ad testificandum.*

The trial court failed to act upon the petition or even to conduct a hearing upon its necessity and the prosecutor's unwillingness to make the confined witness available in violation of the Defendant's constitutional rights. *See, Shirley v. North Carolina,* 528 F.2d 819 (4th Cir. 1975) (holding that refusal to grant continuance to secure presence of essential witness confined in stockade by military authorities violated compulsory process clause of the sixth amendment) (denial of continuance motion). Clearly, the Defendant's

right to compulsory process was denied and the actions of the prosecutor and inaction of the court ripened into a due process denial.

3. Three requirements must be established for the admission of a statement of an alleged co-conspirator. *United States v. Weiner,* 578 F.2d 757 (9th Cir. 1978). Before such a declaration can properly be admitted, the court must make a preliminary determination whether the requirements for admissibility have been met. *United States v. Stroupe,* 538 F.2d 1063, 1065 (4th Cir. 1976).

Admittedly, no error is committed where the trial court makes a clear determination in the record, supported by a fair preponderance of independent evidence, that the conspiratorial declarations are admissible. *Cf., United States v. Talbert,* 706 F.2d 464, 468 (4th Cir. 1983) (no error to allow conspiratorial admission where sufficient independent evidence of conspiracy was presented and the trial court made preliminary determination of admissibility). *Compare, United States v. Stroupe,* 538 F.2d 1063, 1065 (4th Cir. 1976); with *United States v. Kelly,* 718 F.2d 661, 663 (4th Cir. 1983). A number of other circuits have held that without an "explicit determination for the record" where the Defendant makes a request for such a determination, regarding the admissibility of the statement, the conviction of the defendant should be reversed. *United States v. Bell,* 573 F.2d 1040, 1044 (8th Cir. 1978) (holding reversal not required on the facts where no request was made). *See, United States v. Williams,* 604 F.2d 1102 (8th Cir. 1979); *United States v. Macklin, 573 F.2d 1046 (8th Cir. 1978); United States v. Hansen,* 569 F.2d 406 (5th Cir. 1978).

In *United States v. Radeker,* 664 F.2d 242 (10th Cir. 1981), the Court of Appeals reversed the defendant's conviction because the trial court admitted the conspiratorial statement without first determining on the record the

elements of Rule 801(d)(2)(E). The Court pointed out that "such statements could be admitted at the close of all evidence and prior to submission of the case to the jury *only if* the trial judge determines that the requisites for admissibility have been met." *Id., quoting from United States v. Petersen,* 611 F.2d 1313 (10th Cir. 1979), *cert. denied,* 447 U.S. 905 (1980), *citing, United States v. Andrews,* 585 F.2d 961 (10th Cir. 1978).

The United States Court of Appeals for the Third Circuit reversed a Defendant's conspiracy conviction where the government failed to make a showing either preliminarily or before the jury of a co-conspirator's unavailability as a requisite to introduction of such admissions at trial in *United States v. Inadi,* 748 F.2d 812 (1984), *cert. granted* _____ U.S. _____, 53 U.S.L.W. 2318, no. 84-1580 (1985). The Court held that the failure to make such a showing and unavailability required reversal because tape recordings were admitted without an adequate determination of this foundational requisite.

In *United States v. Ziegler,* 583 F.2d 77 (2d Cir. 1978), the court reversed a conviction in which a government agent was permitted to repeat on the witness stand the statements made to him by an informer purporting to embody admissions made by the defendant in conversations with the informer. The failure to make a preliminary finding concerning the elements necessary for the foundation to admit co-conspirator's declarations was erroneous. The court reasoned that "[t]his was error and harmful since it foreclosed Appellant from the possibility of obtaining a preliminary determination [of admissibility]. . . ." *Id.* at 81.

The purpose of the rules governing preliminary determinations of the admissibility of such evidence is to prevent prejudice and to "avoid the danger that the jury might convict on the basis of these statements without first deal-

ing with the admissibility question." *United States v. James,* 590 F.2d 575, 579 (5th Cir. 1979), *cert. denied,* 442 U.S. 917 (1979).

> It was this same danger which motivated the Supreme Court to hold in *Jackson v. Denno,* 378 U.S. 368, 84 S.Ct. 1774, 12 L.Ed.2d 908 (1964), that 'a criminal defendant is entitled to have a 'reliable and clearcut determination of the voluntariness of [his] confession, including the resolution of disputed facts upon which the voluntariness issue may depend, made by someone other than the jury which is to determine his guilt or innocence....
>
> The admissibility of co-conspirators' declarations in a conspiracy trial, however, does pose problems precisely because they are relevant. *Such evidence endangers the integrity of the trial* because the relevance and apparent probative value of the statements may be so highly prejudicial as to the color other evidence even in the mind of a conscientious juror, despite instructions to desregard the statements or to consider them conditionally.

Id. (emphasis added).

In *Lego v. Twomey,* 404 U.S. 477 (1972), this court sanctioned the practice with respect to confessions of pretrial hearings to have a judge hear the evidence from both sides and, using the preponderance of the evidence standard, to determine whether the confession is admissible. Due process of law, apart from the requirements of the Federal Rules of Evidence, gices the defendant the right to a determination of admissibility before the jury can hear such statements. *Jackson v. Denno,* 378 U.S. 368 (1964).

Similarly, a denial of a preliminary hearing on admissibility of statements such as those in this case without affording any opportunity for a hearing of any sort, even

as a part of a *voir dire* at trial, should be condemned as a denial of due process. Fundamental fairness and the interests of justice require that when an accused requests or if an accused is a witness on the issue, then a hearing should be conducted outside the presence of the jury on matters other than the suppression of confessions, specifically, the admissibility of vicarious admissions.

In this case, the defendant, Jackson, requested an independent hearing upon his motion in limine prior to trial. The magistrate in ruling on the motion ruled that "[e]ssentially, the defendant is requesting a 'James' hearing." The magistrate ruled, however, and the district court later adopted the magistrate's decision, that since "the Fourth Circuit has not adopted the *James* decision. . .the pre-trial motion for a hearing out of the presence of the jury as to the admissibility of co-conspirator's statements [was]. . .denied."

The opinion of the Fourth Circuit Court of Appeals in this case follows the same reasoning and follows *United States v. Hines,* 717 U.S. 1481, 1488 (4th Cir. 1983). Such a ruling would not be appropriate, even though a particular circuit has not adopted the rule of *United States v. James,* 590 F.2d 575 (5th Cir. 1979). *James* was decided on the basis and authority of the Federal Rules of Evidence and neither *James* nor *Hines* nor other cases address or dispose of this due process contention.

Where a defendant challenges the use of a statement, which may have substantial prejudicial impact, then he has a constitutional right to "an adequate evidentiary hearing productive of reliable results. . ." with respect to the admissibility of the statement. *Jackson v. Denno,* 378 U.S. 368, 394 (1964). The need for such an evidentiary hearing outside the presence of the jury is more than a merely technical procedural, evidentiary difficulty. "These apparently

technical problems are of enormous significance in the conspiracy trial. Conspirator statements are often the central evidence in the case." Kessler, *The Treatment of Preliminary Issues of Fact in Conspiracy Litigation: Putting the Conspiracy Back into the Co-conspirator Rule,* 5 Hofstra L. Rev. 77, 79 (1976).

In *Jackson v. Denno, supra,* the court ruled that because of the substantial danger of prejudice and the seriousness of the consequences of the prescribed procedure for admitting confessions and determining their admissibility, at the very least, a full evidentiary hearing is necessary to determine the factual context in which the statement was made. *Id.* at 392. Similarly, in connection with co-conspirators statements, the Fifth Circuit Court of Appeals, in *United States v. James,* 590 F.2d 575, 581-82 (5th Cir.) (en banc), *cert. denied* 442 U.S. 917 (1979), reasoned that

> [b]oth because of the 'danger' to the defendant if the statement is not connected and because of the inevitable serious waste of time, energy and efficiency, when a mistrial is required in order to obviate such danger, we conclude that the present procedure warrants the statement of a proffered order of proof in such case. The District Court should, whenever reasonably practicable, require the showing of a conspiracy and of the connection of the defendant with it before admitting declarations of a co-conspirator.

If preliminary hearings on the admissibility of confessions must always be conducted outside the hearing of the jury under *Jackson v. Denno,* 378 U.S. 368 (1964), and as required by Fed. R. Evid. 104(c), then due process and fundamental fairness require that hearings on co-conspirator's statements which are, as equally devastating as a confession, should be held outside the hearing of the jury. In the present case, not only were statements alleged to have been

made to facilitate illegal transactions, but the government agents testified to declarations of Preston Lee Jackson that the defendant was involved in illegal transactions. Such declarations were tantamount to a vicarious confession.

Here, the defendant also contended that he was not afforded his right to testify at any hearing and to present his version or contentions with respect to a lack of the elements necessary to establish a foundation to admit co-conspirator's statements. Due process entitles a defendant to an opportunity to testify or to present evidence on the issue of admissibility of statements. *Luck v. United States,* 348 F.2d 763 (D.C. Cir. 1965) (holding that the factual basis of a voluntariness objection with respect to a defendant's statement should be explored out of the jury's presence). In that hearing in the jury's absence, both sides, the government and the defendant, should be afforded an opportunity to present their versions. *Id. See, United States v. Ciampaglia,* 628 F. 2d 632, 638 (1st Cir. 1980), *cert. denied,* 449 U.S. 1038 (1980) (recognizing that the preponderance test for admissibility of conspiratorial admissions "implicitly anticipated that the defendant's evidence would be taken into consideration"). Further, the defendant argues that he was deprived of the right and opportunity to tender such testimonial proof to the court without giving up his right to remain silent and without subjecting himself to cross-examination before the jury. *Cf., Simmons v. United States,* 390 U.S. 377 (1968) (search and seizure issues).

CONCLUSION

The petition for a writ of certiorari should be granted.
Respectfully submitted.

RONNIE M. MITCHELL
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Attorney

Appendix

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 84-5156

UNITED STATES OF AMERICA, APPELLEE

v.

GARY JACKSON, a/k/a "ROE", APPELLANT.

Appeal from the United States
District Court for the
Eastern District of North Carolina,
at Fayetteville,
W. Earl Britt, Chief District Judge.

(CR 84-12-01-CR-3)

Argued: December 3, 1984.

Decided: March 21, 1985

Before PHILLIPS and WILKINSON Circuit Judges,
and BUTZNER, Senior Circuit Judge.

Ronnie M. Mitchell (Christopher B. Godwin; Harris, Sweeny & Mitchell on brief) for appellant; Francis J. Martin, Department of Justice (Samuel T. Currin, United States Attorney on brief) for Appellee.

PHILLIPS, Circuit Judge:

Gary Jackson appeals from his convictions in the United States District Court for the Eastern District of North Carolina of conspiracy to illegally possess drugs with intent to distribute and to unlawfully acquire and possess food coupons, 18 U.S.C. § 371; various drug and illegal food stamp offenses, 6 U.S.C. § 2024(b), 21 U.S.C. § 841(a)(1); and use of a telephone in the scheme, 21 U.S.C. §§ 843(b) and (c). Finding no prejudicial error, we affirm.

I

On the conspiracy count the government offered proof that Hackson participated in the conspiracy with Preston Jackson, Gary's nephew, and Michael Thompson, another relative, from April 7, 1983, until November 29, 1983. The district court admitted into evidence out of court statements implicating Jackson made by Preston Jackson and Thompson to government agents prior to April 7 concerning drug, gun and food stamp deals arranged by the undercover agents. The government also presented a taped phone conversation between agents and Gary Jackson arranging a deal for April 7, evidence that Preston Jackson and Thompson consummated deals outside Gary Jackson's house and evidence that Gary Jackson backed out of an arranged deal on April 1. The government did not establish face to face dealings between Gary Jackson and undercover agents.

Jackson first argues for reversal because the district court followed inadequate procedures in admitting the ut of court statements of Preston Jackson and Thompson made to government agents under Fed. R. Evid. 801(d)(2)(E), which makes co-conspirator's statements during the course of and in furtherance of the conspiracy nonhearsay that is admissible agaainst the defendant conspirator. Jackson contends that the court must conduct an on the record, away from the jury hearing to determine whether the government presented sufficient independent

evidence of the conspiracy before invoking the co-conspirator statement rule. Jackson also argues that the trial judge erred in not making an explicit ruling that sufficient independent evidence exists and in not submitting the admissibility issue to the jury.

Jackson is correct that the court may admit co-conspirator's out of court statements under Rule 801(d)(2)(E) only is the government presents substantial independent non-hearsay evidence of the conspiracy and Jackson's connection to it. *United States v. Stroupe,* 583 F2d 1063, 1065 (4th Cir. 1976). However, as we have recently held, the trial court need not hold an on the record, away from the jury hearing to determine the admissibility question. *United States v. Hines,* 717 F.2d 1481, 1488, (4th Cir. 1983). Moreover, the trial judge need not make an explicit ruling that sufficient independent evidence of the conspiracy exists before admitting the hearsay. Instead, the court may admit the hearsay and later declare a mistrial, or, when appropriate, exclude the hearsay and give a limiting instruction, if the government fails to connect up with independent evidence. *See Bruton v. United States,* 391 U.S. 123, 135 (1068); *Hines,* 717 F.2d at 1488. Finally, this court has rejected Jackson's argument that thejury should make the admissibility determination, *Id.* Hence, Jackson's allegations of error in the procedure followed by the district court to invoke Rule 801(d)(2)(E) have no merit.

II

Jackson next argues that the district court erred in admitting our of court statements of co-conspirators made in March because the indictment charges him with conspiracy beginning on April 7. Hearsay statements are admissible under Rule 801(d)(2)(E) even if no formal charge of conspiracy exists so long as the government establishes in

dependent evidence of the conspiracy. *United States v. Jones,* 542 F.2d 186, 202 n.31 (4th Cir. 1976). In addition, upon joining the conspiracy, earlier statements made by co-conspirators after inception of the conspiracy become admissible against the defendant. *United States v. LeRoux,* 738 F.2d 943, 949-50 (8 Cir. 1984). The evidence of consummation of deals outside Jackson's house in the middle of March and the deal arranged between Jackson and agents at the end of March constitute substantial independent evidence that fulfills the government's preponderance burden of proving the conspiracy's existence in March and Jackson's connection to it at that time. Hence, the trial court properly admitted the co-conspirator's statements made in March under Rule 801(d)(2)(E) even though the indictment did not charge Jackson with conspiracy during March. Moreover, even if the evidence did not show Jackson's connection to the conspiracy in March, the taped phone call arranging the April 7 deal constitutes ample independent evidence that Jackson joined the conspiracy in early April making the earlier statements of co-conspirators admissible against him.

Jackson further argues that the district court failed to provide adequate limiting instructions to the jury to limit their consideration of the out of court statements. The district court instructed the jury that where the statements established acts of Jackson occurring prior to the acts for which he was charged, the jury must limit the use of the evidence to issues of intent. The instruction is consistent with Fed. R. Evid. 404(b), and Jackson was not entitled to further instructions limiting the use of the properly admitted statements.

III

Jackson next alleges that the trial court erred in deny-

ing his motion for a bill of particulars to obtain thenames of persons that the government alleged to be in the conspiracy and his motion in limine to exclude hearsay statements of persons not specifically charged as, or alledged to be co-conspirators. Although grant of a bill of particulars lies in the discretion of the trial court, the defendant may show abuse of discretion in denying the motion by providing unfair surprise. *See Wong Tai v. United States,* 273 U.S. 77, 82 (1927). Jackson alleges unfair surprise in that the court admitted hearsay statements of Preston Jackson even though Jackson lacked notice that the statements would be used. Jackson's claim of surprise is not believable in view of the fact that Preston, a near kinsman and undisputed compatriot of Jackson's, had recently been convicted on federal charges arising our of the same transactions leading to Gary Jackson' s convictions. Moreover, Jackson makes no showing that any surprise that occurred prejudiced him. Hence, we find no abuse of discretion in denial of the motion for teh bill of particulars. Jackson was not entitled to exclusion of out of court statements of co-conspirators not specifically charged as or alleged to be co-conspirators because Rule 801(d)(2)(E) does not require that formal charges of conspiracy exist. *See Jones,* 542 F.2d at 202 n.31. Hence, the trial court properly denied Jackson's motion in limine.

IV

Jackson next argues that the government violated Fed. R. Crim. P. 16(a)(1)(A) in failing to disclose after a request for discovery statements of co-conspirators that contained statements that he made and statements that incriminated him. By its terms, Rule 16(a)(1)(A) requires the government to disclose oral statements of the defendant to be introduced at trial only if the defendant made the statement to a

government agent during interrogation. *See United States v. Percevault,* 490 F.2d 126, 131 (2d cir. 1974). Moreover, Rule 16(a)(1)(A) in no way encompasses statements fo co-conspirators simply because the statement implicated the defendant, and 18 U.S.C. § 2500(a) expressly makes statements of witnesses including co-conspirators, not discoverable if the witness is a prospective government witness. *See, id.* Nevertheless, courts have found that statements of co-conspirators must be disclosed if the government does not intend to call the co-conspirator as a witness. *See, United States v. Konefal,* 566 F. Supp. 698, 705-07 (N.D.N.Y. 1983) (cases in accord cited therein).

We agree with the reasoning of the court in *Konefal* that the defendant is entitled to disclosure of statements of co-connspirators if the co-conspirator is not a prospective government witness and disclosure does not unnecessarily reveal sensitive information. *See* 566 F. Supp. at 706-07. Rule 802(d)(2)(E) permits the government to introduct the statements of a co-conspirator against the defendant as if they were his own, and protection against unfair surprise justifies a disclosure requirement. Although Rule 801(d)(2)(E) makes the co-conspirator's statements non-hearsay, the out of court statements nonetheless lack the indicia of reliability that attaches to testimony given in the solemn atmosphere of a court by a witness subject to cross examination. By giving the defendant notice of the statements, he may properly investigate their origina nd if grounds exist, attemp to discredit the statements.

Moreover, the policies behind 18 U.S.C. § 3500(a), which limits discovery of statements, are not applicable because there is a lesse risk of intimidation of the witness or efforts to suborn perjury when the hearsay declarant is not a prospective witness. *See, Percevault,* 490 F.2d at 131 (discussing policies behind the Jencks Act). The policy of

protecting witnesses who agree to aid the government from intimidation is but tenuously implicated, and even if disclosure led the defendant to secure false testimony from teh declarant, the jury would not likely be misled since the government could impeach with prior inconsistent statements. In these circumstances, the risk of perjury is outweighted by the risk of unfair surprise to the defendant.

However, the discovery violation in this case does not entitle Jackson to reversal because he does not demonstrate prejudice. *See United States v. Jennings,* 724 F.2d 436, 444 (5th Cir. 1984). Preston Jackson was convicted before Jaclson went to trial, so Jackson knew or could have discovered the nature of the statements that the government would present. More importantly, Jackson makes no showing that he could have discredited teh out of court statements properly admitted against him had he received prior disclosure of their contents. Hence, no sanction for the discovery violation is warranted.

V

Finally, Jackson contends that the government violated his rights of compulsory process and confrontation in refusing to produce Preston Jackson, who was in federal prison in Memphis, Tennessee, so that Preston could testify at trial. Jackson also challenges denial of his petition for habeas corpus ad testificandum to secure Preston Jackson's presence that he filed after the trial began.

Ordinarily, if the government refuses to produce a witness in its custody who is necessary to the defence, and the court denies habeas, teh defendant's compulsory process may stand violated. *See, Clark v. Blackburn,* 632 F.2d 531, 533-35 (5th Cir. 1980). Bur we hold that no violation occurred here.

The district court's power to issue the writ of habeas

corpus ad testificandum derives from 28 U.S.C. § 2241(c)(5), which permits the court to order a prisoner brought into court when necessary. *Spears v. Chandler,* 672 F.2d 834, 835 (11th Cir. 1982). The issuance of the writ lies in teh discretion of the court. *United States v. Leon,* 679 F.2d 534,539 (5th Cir. 1982). Wh hold that when, as here, the defendant fails to petitionf or this habeas relief until after the beginning of the trial, teh trial judge has discretion in ruling on the petition comparable to his discretion in ruling on a motion for a continuance to secure a witness during trial, for the effect and purpose of the petition is the same as the motion for continuance. The defendant is not entitled to special consideration by the fortuity that the witness he seeks to secure is in custody.

The trial court abuses its discretion in not halting proceedings to allow the defendant to secure a witness when the witness appears to be prepared to give exculpatory testimony and the defendant has made reasonable efforts to secure the witness's presence before trial. *See, Shirley v. North Carolina,* 528 F.2d 819, 822-23 (4th Cir. 1973). Jackson failed to show that the trial court abused its discretion because no evidence exists in the record to show that Preston Jackson was prepared to give exculpatory testimony. Moreover, since Preston Jackson was convicted prior to teh beginning of Jackson's trial, Jackson either knew or could have known of possible exculpatory testimony that Preston might give, yet he did not attempt to secure Preston's presence prior to trial. Hence, we find no violation of Jackson's compulsory process right.

AFFIRMED.

WILKINSON, Circuit Judge, concurring separately:

I cannot agree with the court that a defendant may demand pre-trial discovery of a co-conspirator's statement whenever the government does not intend to call the co-conspirator to testify. I would prefer not to reach this issue, given the absence of any prejudice to the defendant, but as the majority elects to do so, I offer a brief response. First, the majority belittles the risk that a declarant co-conspirator will be harassed or intimidated. Next, it converts a perceived danger of "unfair surprise" to defendants into an inflexible requirement of pre-trial disclosure. The result is a requirement of pre-trial disclosure. The result is a regrettable turn toward rigidity in the law of criminal discovery.

I

I do not share the majority's conclusion that the interest in protecting a co-conspirator declarant from intimidation is but "tenuously implicated." In expressing such concerns, I doubt that I am seeing ghosts. The stakes for those accused are high. The co-conspirator's statement materially assists the prosecution's case. The co-conspirator, moreover, it well known to those on trial. The dangers of threat or bribe are acute in the conspiracy context, where mutual associats, not all of whom may have been arrested, share common interests in pressing a declarant to disown whatever damaging remarks he may have made.

"Fear of intimidation of witnesses and concern over efforts to suborn perjury were not flights of fancy by those who drafted Rule 16." *United States v. Percevault,* 460 F.2d 126, 131 (2d Cir. 1974). These fears fo not evaporate when the statement is to be introduced through the testimony of federal agents pursuant to the co-conspirator exception to the hearsay rule, Fed. R. Evid. 801(d)(2)(E). However admitted, the adverse impact of the co-conspirator's remarks

remains, along with the incentive to defendants to have them recanted. It is true, as the majority notes, that testimony secured by a defendant repudiating the co-conspirator's prior incriminating declaration can be impeached. This is equally true, however, where the co-conspirator testifies, yet the possibility of the government's impeaching its own witness, Fed. E. Evid. 607, did not lead the drafters of the Hencks Act to adopt the result the majority reaches here.

It is no answer to say that a prosecutor concerned about coercion may seek from teh trial court a protective order under Fed. R. Crim. P. 16(d)(1), which provides that discovery otherwise availabe be "denied, restricted, or deferred" upon a sufficient showing. Here, the government would bear the burden of showing within a conspiracy the likelihood of untoward pressure it may not even be in a position to detect. Moreover, themajoriyt's calculation that "the risk of unfair surprise" to defendants outweights "the risk of perjury" in 801(d)(2)(E) situations renders the government's chances on a 16(d)(2)(E) situations renders the government's chances on a 16(d) motion problematical at best.

Indeed, nothing in Fed.R.Crim.P. 16 authorizes the majority's result. Rule 16(a)(1)(A) requires the government to disclose to the defendant his own statements which the government intends to offer at trial and which were made to a person then known to the defendant as a government agent. It does not, as the majority acknowledges, confer a right to discover the statements of anyone else, and in particular it make sno mention of co-conspirators. To attempt, as some courts have done, *see, e.g., United States v. Konefal,* 566 F.Supp. 698, 706 (N.D.N.Y. 1983); *United States v. Fine,* 413 F. Supp. 740, 742, (W.D. wis. 1976), to justify discovery of the co-conspirator's statement as a "vicarious

admission" of the defendant is to make one person out of two and beg the question of undue pressure which may result.

II

The respective interests of prosecution and defense can be amply accommodated short of the majority's result. The court errs in linking the danger of "unfair surprise" with a requirement of pre-trial disclosure. Traditionally, these have been distinct in the law of criminal discovery. Courts have been able to guard against the danger of unfair surprise to defendants without opening statements to discovery upon request.

Pre-trial disclosure of prior statements of government witnesses would appear as necessary to prevention of "unfair surprise" as discovery of the statements of declarant co-conspirators. Yet the Jencks Act, 18 U.S.C. § 3500(a), expressly disallows discovery of witness statements "until said witness has testified on direct examination in the trial of the case." Under § 3500(b) and (c), a defendant is entitled to receive the contents of any statement relating to the subject of testimony once given, and the trial court may grant a continuance to allow the defendant reasonable time to prepare for use of the statement at trial.

I see no reason not to apply that same appraoch here. In the great majority of cases, whether the statement be that of a prospective witness or a declarant co-conspirator, the government will disclose early in the itnerest of simple fairness, in the hope of achieving a favorable plea bargain, or from a desire to avoid interruption of the trial. In those cases where concern about intimidation prompts the prosecution to delay disclosure until the co-conspirator statement is admitted, the court can grant the defendant a reasonable continuance to assess the co-conspirator state-

ment in the government's possession and to prepare to respond. Under any scenario, there will be no "unfair surpirse."

III

I share with the majority the belief that a criminal trial must be a sober quest for truth and justice and not a game of evidentiary hide and seek. The real question here is a rather speculative one: whether it is more likely that prosecutors will abuse a Jencks-type device to delay disclosure of co-conspirator statements unjustifiably or whether defendants will pursue pre-trial discovery to pressure co-conspirators into perjured testimony. Because the balance of bad faith does not for me fall so heavily against the government, I write, with respect, this separate statement of my views.

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 84-5156

UNITED STATES OF AMERICA, APPELLEE

v.

GARY JACKSON, A/K/A "ROE", APPELLANT.

Appeal from the United States
District Court for the
Eastern District of North Carolina,
at Fayetteville,
W. Earl Britt, Chief District Judge.

(CR 84-12-01-CR-3)

The appellant's and appellee's petition for rehearing and suggestion for rehearing in banc were submitted to this Court. As no member of the Court requested a poll on the suggestion for rehearing in banc, and

As the panel considered the petitions for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petitions for rehearing and suggestion for rehearing in banc are denied.

Entered at the direction of Judge Phillips, with the concurrence of Judge Butzner and Judge Wilkinson as to appellant's petition. Judge Wilkinson would grant appellee's petition.

FOR THE COURT,

John M. Greacen
Clerk

CERTIFICATE OF SERVICE

Counsel for Defendant hereby certifies that three (3) copies of the foregoing Petition for Writ of Certiorari, produced under Rule 33 of the Revised Rules of the Supreme Court of the United States of America in accordance with Rule 28 of the Revised Rules of the Supreme Court of the United States. Further counsel certifies that such service was accomplished by mail, consisting of depositing the copies of the document in a United States post office at Fayetteville, North Carolina, with first class postage prepaid, addressed to the Honorable Rex E. Lee, Solicitor General of the United States, Department of Justice, Washington, D.C. 20530.

This the 26th day of July, 1985.

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(2)

No. 85-157

Supreme Court, U.S.
FILED
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CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1985

GARY JACKSON, a/k/a ROE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether petitioner may now contest the admission of co-conspirator statements on Confrontation Clause grounds although he made no such objection at trial.

2. Whether petitioner is entitled to reversal of his convictions under the Compulsory Process Clause or the Confrontation Clause because the trial judge refused to issue a writ of habeas corpus ad testificandum for an incarcerated witness sought by the defense, where petitioner did not apply for the writ until after trial had commenced and has not shown that the witness would have given material testimony favorable to the defense.

3. Whether a trial court is always required, before permitting testimony regarding co-conspirator statements, to conduct a hearing outside the presence of the jury and to make a determination that the threshold facts required for admission have been shown.

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In the Supreme Court of the United States

OCTOBER TERM, 1985

No. 85-157

GARY JACKSON, a/k/a ROE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-11) is reported at 757 F.2d 1486.

JURISDICTION

The judgment of the court of appeals was entered on March 21, 1985. A petition for rehearing was denied on May 30, 1985 (Pet. App. 12). The petition for a writ of certiorari was filed on July 26, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of North Carolina, petitioner was convicted on one count of conspiracy to possess and distribute marijuana and to acquire and possess illegal food stamps, in violation of 18 U.S.C. 371. He was also convicted

of unauthorized acquisition of food stamps, in violation of 7 U.S.C. 2024(b); possession of marijuana with intent to distribute, in violation of 21 U.S.C. 841(a)(1); distribution of marijuana, in violation of 21 U.S.C. 841(a)(1); and use of a telephone to facilitate the sale of marijuana, in violation of 21 U.S.C. 843(b) and (c) (J.A. 3, 6-10). He was sentenced to concurrent five-year terms of imprisonment on the conspiracy count and the two substantive marijuana offenses; a concurrent four-year term on the telephone facilitation count; and a four-year term on the food stamp acquisition count, to run consecutively to the sentence imposed on the conspiracy count. A two-year special parole term was also imposed on the marijuana possession counts. The court of appeals affirmed (Pet. App. 1-11).[1]

1. The pertinent facts are summarized in the opinion of the court of appeals (Pet. App. 1). On the conspiracy count, the government's evidence consisted, in part, of the out-of-court statements of co-conspirators, particularly petitioner's nephew, Preston Jackson (hereinafter Preston), implicating petitioner in deals to sell drugs and guns to government undercover agents in exchange for food stamps. It showed that on March 15, 1983, two undercover agents met Preston at a restaurant. They informed him that they had a large quantity of food stamps for sale and that they were interested in purchasing guns and marijuana (J.A. 101-104).[2] Preston made a phone call, returned, and informed the agents that petitioner had a revolver for sale (J.A. 105). After the agents transported Preston to petitioner's residence, he went into the house, returned with the revolver,

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[1]Petitioner's indictment named Michael Thompson as an unindicted co-conspirator. After Thompson was indicted separately, his case was joined for trial with petitioner's. Thompson was convicted of conspiracy and placed on probation.

[2]"J.A." is the abbreviation for the Joint Appendix in the court of appeals.

and stated that petitioner was willing to sell it for $260 worth of food stamps (J.A. 106). After some haggling, the agents agreed on the original price, provided that petitioner include some ammunition, which Preston also obtained from petitioner's house. On this occasion, Preston also informed the agents that petitioner did not want to meet too many people and that all dealings would have to be made through him (J.A. 109).

After the sale was completed, co-defendant Michael Thompson approached the car in which the agents were sitting with Preston, who reassured the agents that Thompson was "another relative." When Thompson asked one of the agents whether he was interested in purchasing two shotguns for $250 in food stamps, the agent suggested that they do business in a less public place because several other individuals were milling around the car (J.A. 108, 188-189). Thompson agreed, noting that the shotguns were actually at another location (J.A. 108, 190). At Thompson's instructions, the agents followed him by car to another house, but the occupant was not at home. Thompson then advised the agents that he would have the shotguns brought to petitioner's house within the hour (J.A. 110, 192). In accordance with Thompson's instructions, the agents returned to petitioner's residence. Thompson and Preston, who was carrying two shotguns, left the house through the front door. The agents then purchased the weapons with $250 in food stamps (J.A. 129).

On March 31, 1983, the agents and Preston were at the home of petitioner's sister, who informed them that petitioner wished to speak with them. When she phoned petitioner and put one of the agents on the telephone, petitioner stated that he wanted to buy more food stamps and asked how many they had. The agent responded that they could get as many as he wanted. Petitioner then asked a confederate how many he wanted; the response was $800 in food

stamps for $400 in cash. When the agent asked whether petitioner had any guns or marijuana for sale, petitioner responded that he had the marijuana but would need to check around for guns (J.A. 140-141). Petitioner then requested that the agents come to his house the next morning (J.A. 140-141).

When the agents arrived at petitioner's residence without Preston, petitioner inquired as to his whereabouts. When the agents stated that Preston was not with them, petitioner spontaneously responded, "I don't mess with food stamps; I don't mess with guns; I just don't get involved in that sort of thing" (J.A. 143-144). As the agents began to leave, however, petitioner stated that he knew a man who had some guns and that he would try to have him there the next day at noon (J.A. 145).

The following day the agents returned. Preston emerged from petitioner's house and informed them that petitioner had marijuana for sale but would take only cash in payment. Petitioner then left the house and informed the agents that he had been unable to contact the individual with guns for sale (J.A. 147-148).

On April 7, 1983, petitioner's sister contacted one of the agents and told him that petitioner wished to speak with him. The agent telephoned petitioner and, in a tape recorded conversation, negotiated the sale of $1,000 in food stamps for $500 in cash (J.A. 149-150; GX 8). Petitioner informed the agent that he planned to make his profit—$50 to $100—as the middleman in the sale to the buyer. The conversation ended with petitioner stating that he would telephone the buyer (J.A. 261-264). When the agent again contacted petitioner, he indicated that the buyer was at his home and that they should come over. He also offered to sell the agent a quarter pound of marijuana in exchange for an additional $100 in food stamps (J.A. 206-208). When the

agent arrived at petitioner's residence, co-defendant Thompson emerged and motioned them toward a shed. Inside, Thompson displayed a quarter pound of marijuana and $500 in cash to pay for $1,000 in food stamps (J.A. 213-214). The agent then made the exchange, giving Thompson $1,040 in food stamps for $520 in cash, and $400 in food stamps for a quarter pound of marijuana (J.A. 214-215).

2. Prior to trial, petitioner filed a motion for a bill of particulars requesting, inter alia, the names and identities of any and all persons alleged to have conspired with him and a statement as to the manner or means by which the conspiracy was alleged to have occurred (J.A. 19). The motion was denied (J.A. 37). In addition, relying upon the decision of the Fifth Circuit in *United States* v. *James,* 590 F.2d 575 (1978) (en banc), cert. denied, 442 U.S. 917 (1979), petitioner filed a motion seeking an order directing that no statement of alleged co-conspirators be introduced into evidence without a prior hearing out of the presence of the jury on the question whether the statement fulfilled the threshold requirement of Fed. R. Evid. 801(d)(2)(E) that it be made by a co-conspirator and fall within the scope of the conspiracy. A magistrate denied the motion, observing that the Fourth Circuit had not adopted the procedures specified in *James* and that a trial court could hear evidence bearing upon the admissibility of a co-conspirator's statements either in or out of the presence of the jury (J.A. 23).[3] Both motions were renewed before the trial judge and were again denied (J.A. 70, 72).

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[3]The magistrate erroneously assumed that the *James* court held that hearings on the admissibility of the statements of co-conspirators must be held out of the presence of the jury. But see pages 12-13, *infra.*

After learning that the government intended to introduce the statements of Preston Jackson, who had previously been convicted by the trial judge for his participation in the scheme, petitioner also moved for production of the statements to be introduced and claimed that failure to furnish them would infringe upon his Sixth Amendment right to confrontation (J.A. 80-83). This motion was also denied (J.A. 83-84).

The jury was empaneled on February 21, 1984. On February 24, 1984, petitioner filed a petition for issuance of a writ of habeas corpus ad testificandum seeking the presence of Preston Jackson, who was then incarcerated as the result of his conviction (J.A. 50). On February 27, 1984, after the trial had begun, petitioner's counsel again objected to the introduction of Preston's statements and renewed his motion for issuance of the writ. During argument on the motion, he averred that when he had sought the prosecutor's assistance in obtaining Preston's presence at trial, the prosecutor had refused and had informed him that the proper procedure was to file a petition for a writ of habeas corpus ad testificandum with the district court (J.A. 72). The trial judge observed that the case had been calendared for trial for a long time and that it was late to be filing a motion for a writ of habeas corpus ad testificandum. Although the court did not issue the writ, it sustained "at [that] point" petitioner's objection to the introduction of Preston's statements as those of a co-conspirator (J.A. 103, 104). However, the court admitted those statements following foundational testimony by one of the FBI undercover agents (J.A. 105).

3. On appeal, petitioner maintained, inter alia, that the district court erred in failing to conduct an out-of-court hearing on the admissibility of Preston's statements; that the government violated Fed. R. Crim. P. 16(a)(1)(A) by failing to furnish him with Preston's out-of-court statements prior to trial; and that the government violated his

right to compulsory process by failing to produce Preston so that he could testify at trial. The court of appeals held that under its precedents the trial judge need not conduct a hearing out of the presence of the jury or make express factual findings before admitting the statements of a co-conspirator, and that, because the petition for a writ of habeas corpus ad testificandum was not filed until after the trial had commenced, the district judge had acted within his discretion in failing to issue the writ. However, the court of appeals also held that Fed. R. Crim. P. 16(a)(1)(A), which requires the government to furnish a defendant as part of pretrial discovery copies of statements that he made "in response to interrogation by any person then known to the defendant to be a government agent," also requires disclosure of statements of co-conspirators made during the course of a criminal enterprise (Pet. App. 4-5). Nonetheless, because petitioner failed to demonstrate any prejudice resulting from this "discovery violation," the court of appeals affirmed the conviction (Pet. App. 6, 7).[4]

ARGUMENT

1. Petitioner contends (Pet. 7-8) that the introduction of Preston Jackson's statements under the co-conspirator rule, Fed. R. Evid. 801(d)(2)(E), violated the Confrontation Clause of the Sixth Amendment because it was not shown that Preston was unavailable to testify. Although this question is the same as that presented in *United States* v. *Inadi,*

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[4]The court of appeals also rejected (Pet. App. 2-3) petitioner's claims that the district court erred in admitting Preston's statements because they were made before the date on which the conspiracy was alleged in the indictment to have begun, and that the district court failed to give adequate limiting instructions as to the use to which the jury could put evidence of prior bad acts admitted under Fed. R. Evid. 404(b).

Judge Wilkinson filed a separate opinion disagreeing with the majority's holding that Fed. R. Crim. P. 16(a) requires discovery of co-conspirator statements (Pet. App. 8-11).

cert. granted, No. 84-1580 (May 28, 1985), an affirmance in *Inadi* would not alter the outcome here. In the courts below, petitioner never challenged the admission of the co-conspirator statements on the Confrontation Clause grounds asserted by Inadi but instead made a very different Sixth Amendment argument. He contended that his rights to compulsory process and confrontation were denied because the United States Attorney and the court failed to arrange for Preston Jackson's presence at trial (see Appellant's Br. 33-38). Thus, petitioner's Confrontation Clause claim, unlike that in *Inadi,* did not concern the *admission* of Preston Jackson's out-of-court statements. Instead, it was solely concerned with securing Preston's *presence in court.* Neither of the lower courts understood petitioner to have raised the *Inadi* issue, and Fourth Circuit precedent on this question is unsettled. Compare *United States* v. *Lisotto,* 722 F.2d 85, 88 (4th Cir. 1983), cert. denied, 466 U.S. 905 (1984), with *United States* v. *Lurz,* 666 F.2d 69, 80-81 (4th Cir. 1981), cert. denied, 455 U.S. 1005 (1982). Thus, petitioner's failure to object to the admission of Preston Jackson's statements on Confrontation Clause grounds may well have affected the trial court's ruling.

Even the circuit that decided *Inadi* has held that a defendant who wishes to raise a Confrontation Clause challenge to the admission of a co-conspirator statement must expressly object on that ground at trial. *United States* v. *Gibbs,* 739 F.2d 838 (3d Cir. 1984) (en banc). Because petitioner made no such objection at trial (and indeed did not even raise the issue on appeal), he is barred from raising it now. See, *e.g., United States* v. *Lovasco,* 431 U.S. 783, 788 n.7 (1977); *Adickes* v. *S.H. Kress & Co.,* 398 U.S. 144, 147 n.2 (1970); *Lawn* v. *United States,* 355 U.S. 339, 362 n.16 (1958).

2. Petitioner renews his claim (Pet. 9-13) that he was denied his Sixth Amendment rights of confrontation and compulsory process by the failure of the prosecutor and the

trial judge to obtain Preston Jackson's presence at trial as a possible defense witness. This claim was properly rejected by the court below.

In the first place, the prosecutor did not, as petitioner now maintains (Pet. 12), refuse to assist him. Rather, as petitioner's counsel explained to the trial judge (J.A. 103), the prosecutor correctly advised him that the proper procedure for obtaining the presence of someone incarcerated in federal prison was to request issuance of a writ of habeas corpus ad testificandum by the district court (*ibid.*).[5] See 28 U.S.C. 2241(c)(5); see also Fed. R. Crim. P. 17(b) (authorizing district courts to issue subpoenas to defense witnesses upon satisfactory showing that the defendant is unable to pay witness fee and that presence of witness is necessary to an adequate defense).

Nor did the district court act improperly in declining to issue the writ. The decision whether to issue a writ of habeas corpus ad testificandum, like the decision whether to issue a

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[5]This case bears no resemblance to the authorities upon which petitioner relies (Pet. 11) to support his claim that the government improperly failed to arrange for Preston's presence at trial. In *Motes* v. *United States*, 178 U.S. 458 (1900), this Court held that the out-of-court statements of a government witness were improperly introduced because the witness was unavailable to testify due to the negligence of government officials in permitting him to escape. In *Hernandez* v. *Estelle*, 674 F.2d 313 (5th Cir. 1981), the district court found that the state had deliberately concealed a material witness. And in *Lockett* v. *Blackburn*, 571 F.2d 309 (5th Cir.), cert. denied, 439 U.S. 873 (1978), the prosecution procured the absence of two potential defense witnesses from the scene of the trial by furnishing them with airline tickets and cash. The court held that the "deliberate concealment of a named eyewitness whose testimony would admittedly be material constitutes a prima facie deprivation of due process" (*id.* at 313 (footnote omitted)).

There is nothing remotely similar in this case. To the contrary, Preston's absence was the result of the failure by defense counsel to file a timely request for a writ of habeas corpus ad testificandum that demonstrated the materiality of the witness's expected testimony.

subpoena requested by the defense under Fed. R. Crim. P. 17(b), is a matter committed to the sound discretion of the district court. See, *e.g.*, *United States* v. *LeAmous*, 754 F.2d 795, 798 (8th Cir. 1985), cert. denied, No. 84-6652 (June 3, 1985); *Ballard* v. *Spradley*, 557 F.2d 476, 480 (5th Cir. 1977). When a motion for issuance of an ad testificandum writ is belatedly filed and fails to specify what exculpatory testimony the potential witness would furnish, denial of the motion is within the district court's discretion. See *Itel Capital Corp.* v. *Dennis Mining Supply & Equipment Co.*, 651 F.2d 405, 407 (5th Cir. 1981); *Peppard* v. *United States*, 314 F.2d 623, 625 (8th Cir. 1963). Here, as the court of appeals observed (Pet. App. 7), petitioner either knew or should have known of any possible exculpatory testimony that Preston Jackson might be able to give, especially since he had been tried and convicted prior to the beginning of petitioner's trial. Nonetheless, petitioner did not file the motion until after the commencement of his own trial and did not specify what the anticipated exculpatory testimony would be.[6]

There is also no merit to petitioner's argument (Pet. 12) that where the rights to confrontation and compulsory process are allegedly violated it is unnecessary to demonstrate on appeal that the missing witness would have provided exculpatory testimony. As the Court explained in *United States* v. *Valenzuela-Bernal*, 458 U.S. 858 (1982), in rejecting the similar claim that the deportation by the government of a potential witness violated the defendant's right to compulsory process under the Sixth Amendment (*id.* at 867 (emphasis added; footnote omitted)):

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[6]The motion merely stated in conclusory terms that Preston Jackson "is a necessary and material witness in the proceeding" and that "[t]he [d]efendant * * * cannot proceed to trial in absence of the said witness" (J.A. 50).

> the Sixth Amendment does not by its terms grant to a criminal defendant the right to secure the attendance and testimony of any and all witnesses: it guarantees him "compulsory process for obtaining *witnesses in his favor.*" U.S. Const., [Amend. VI] (emphasis added). In *Washington* [v. *Texas,* 388 U.S. 14 (1967)] this Court found a violation of this Clause of the Sixth Amendment when the defendant was arbitrarily deprived of "testimony [that] would have been *relevant* and *material,* and . . . *vital* to the defense." 388 U.S., at 16 (emphasis added). This language suggests that respondent cannot establish a violation of his constitutional right to compulsory process merely by showing that deportation of the passengers deprived him of their testimony. ***He must at least make some plausible showing of how their testimony would have been both material and favorable to his defense.***

See also *id.* at 872-873 (a violation of the compulsory process clause requires some showing that the evidence would be both favorable and material to the defense); *United States* v. *Bagley,* No. 84-48 (July 2, 1985), slip op. 13-14; *Strickland* v. *Washington,* No. 82-1554 (May 14, 1984), slip op. 24-26. Here, as in *Valenzuela-Bernal,* "the [defendant] made no effort to explain what material, favorable evidence the [missing witness] would have provided for his defense" (458 U.S. at 874). Therefore, regardless of the reasons for Preston Jackson's absence at trial, petitioner is entitled to no relief.

3. Relying upon the decision of the Fifth Circuit in *United States* v. *James, supra,* petitioner claims (Pet. 13-18) that before the out-of-court statements of a co-conspirator may be admitted into evidence, a trial judge is invariably obligated to conduct an evidentiary hearing out of the presence of the jury and to determine whether the necessary foundational requirements have been met. This

contention is also without merit and, even if correct, would involve a point of procedure that is now immaterial and at most harmless error in petitioner's case.

a. In order to permit the admission of the statements of co-conspirators under Fed. R. Evid. 801(d)(2)(E), the government must establish by independent evidence (1) that a conspiracy existed; (2) that the defendant and the declarant were both members of the conspiracy; and (3) that the statement was made in the course of and in furtherance of the conspiracy. See, *e.g., United States* v. *Alvarez,* 755 F.2d 830, 855 (11th Cir. 1985). In *James,* 590 F.2d at 582, the Fifth Circuit, exercising its supervisory power, held that, to avoid the risk of unfair prejudice to the defendant or the danger of a mistrial, the preferable procedure is for the government to establish the necessary foundation under Fed. R. Evid 801(d)(2)(E) prior to introducing the statements of the co-conspirator. The *James* court made clear, however, that the preferred order of presenting evidence was not mandatory, and that a trial court, in the exercise of its discretion, may permit the introduction of co-conspirator's statements subject to subsequent connection and a determination by the court that the foundational requirements have been fulfilled.[7] In addition, the *James* court did not require that the foundational evidence be presented out of the presence of the jury. See 590 F.2d at 578-582; *id.* at 585 (Tjoflat, J., concurring) (an objective of the en banc majority was to eliminate the requirement for a "minitrial" outside presence of jury to determine admissibility of

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[7]In particular, the *James* court held that (590 F.2d at 582):

> The district court should, whenever reasonably practicable, require the showing of a conspiracy and of the connection of the defendant with it before admitting declarations of a co-conspirator. If it determines it is not reasonably practical to require the showing to be made before admitting the evidence, the court may admit the statement subject to being connected up.

statements of co-conspirators); *United States* v. *Montemayor,* 703 F.2d 109, 117 (5th Cir.), cert. denied, 464 U.S. 822 (1983) (rejecting claim that defendant had right to hearing out of presence of the jury to determine whether necessary foundation established for admission of statement of co-conspirator). Other courts of appeals have likewise neither forbidden trial judges from admitting co-conspirator statements subject to the subsequent satisfaction of the foundational requirements nor required the predicate to be established out of the presence of the jury. See, *e.g., United States* v. *Caudle,* 758 F.2d 994, 998 (4th Cir. 1985); *United States* v. *Norton,* 755 F.2d 1428, 1431 (11th Cir. 1985); *Llach* v. *United States,* 739 F.2d 1322, 1327-1329 (8th Cir. 1984); *United States* v. *Reed,* 726 F.2d 570, 580 (9th Cir. 1984), cert. denied, No. 83-1912 (Oct. 1, 1984); *United States* v. *Monaco,* 700 F.2d 577, 581 (10th Cir. 1983).

In the present case, the trial judge, who had previously presided at Preston Jackson's own trial and had thus already heard evidence bearing upon the conspiracy (see J.A. 73, 102), plainly did not exceed the latitude afforded by these authorities in the procedure he followed in admitting his statements. Although he made no finding in haec verba that the foundational requirements of Fed. R. Evid. 801(d)(2)(E) had been met, this was the import of his rulings. Thus, although the trial judge initially excluded testimony by an FBI agent concerning the statements, immediately after the agent testified that Preston had taken him and an associate to persons, including petitioner, who would trade guns for food stamps, the trial judge reversed this ruling and admitted the testimony regarding the co-conspirator statements. In this context, the ruling was

plainly the result of a determination that the necessary foundation had been established by the evidence *aliunde*.[8]

In any event, the chief way in which the *James* court's rule is intended to protect defendants is by preventing prejudice in the event that the requisite foundation is not ultimately laid. See *James*, 590 F.2d at 581-582. Here, however, as the court below observed (Pet. App. 3), the government presented abundant and undisputed evidence demonstrating the existence of a conspiratorial relationship between petitioner and Preston Jackson. Not only did it show that the March 1983 transactions arranged by the latter were consummated outside petitioner's residence, which was the apparent source of the firearms bartered for the food stamps, but that on subsequent occasions the undercover agents had direct dealings with petitioner during which they negotiated the sale of food stamps by telephone and personal contact. Given the compelling nature of this evidence, it is beyond dispute that a sufficient foundation was established, and there is no reason to believe that petitioner would have benefitted in the least if the district court had adopted different procedures. Indeed, it is significant that petitioner makes no claim to the contrary. See, *e.g.*, *United States* v. *Prows*, 728 F.2d 1398, 1401 (11th Cir. 1984) (any

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[8]This case is thus clearly distinguishable from the authorities upon which petitioner relies (Pet. 13-14) to support his claim that the procedure the trial judge followed in admitting the co-conspirator statements was defective because of his failure to make the necessary preliminary findings of fact. In *United States* v. *Radeker*, 664 F.2d 242 (10th Cir. 1981), the trial judge made no determination whatsoever that the threshold requirements had been met for the introduction of a co-conspirator's out-of-court statements and left determination of the matter to the jury. In this case, by contrast, it is apparent that following the agent's testimony concerning Preston Jackson's involvement in the food stamp sales scheme with petitioner, the district court made a determination that a sufficient foundation had been established to warrant admitting testimony concerning his declarations.

error of court in making threshold finding admitting conspirators statement rendered harmless because conspiracy was subsequently established); *United States* v. *Richardson*, 694 F.2d 251, 254 (11th Cir. 1982) (trial judge did not abuse discretion in denying hearing on admissibility of co-conspirator statements outside presence of jury; sufficient foundation evidence subsequently introduced and defendant made no claim of prejudice).

b. Nor is there any substance to petitioner's argument (Pet. 15-18) that, under this Court's decision in *Jackson* v. *Denno*, 378 U.S. 368 (1964), due process considerations require that evidence bearing upon the admissibility of the statements of co-conspirators be received outside the presence of the jury.[9] In *Jackson*, 378 U.S. at 376-377, the Court held that, at some stage of a criminal proceeding, the defendant has the right to have the voluntariness of his confession determined by the court out of the presence of the jury. See also *Sims* v. *Georgia*, 385 U.S. 538, 543-544 (1967); 18 U.S.C. 3501(a) (hearing on voluntariness must be held out of the presence of the jury). The *Jackson* Court struck down the New York procedure under which the jury returned a general verdict after being called upon to decide both the issue of voluntariness and the issue of guilt. Under this procedure, the Court noted (378 U.S. at 380), there was no way of knowing what decision the jury had reached regarding the voluntariness of the confession—or indeed whether the jury had reached any decision at all on that issue. The Court also concluded (*id.* at 380-387) that this procedure created an unacceptable risk that the jury's decision on voluntariness might be influenced by its belief that the confession was true. Finally, the Court reasoned (*id.* at

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[9]By contrast with this claim, petitioner argued that the jury should have made the determination whether to admit the statements of the co-conspirators (see Pet. App. 2; Appellant's Br. 45-49).

388-391) that even if the jury found that the confession was involuntary and should not be considered, there was too much danger that the confession might nevertheless affect the verdict.

No similar problems are created by the procedure for admitting co-conspirator statements under Fed. R. Evid. 801(d)(2)(E). The question of the admissibility of co-conspirator statements is decided solely by the court, not the jury, and is made on the record, not subsumed by a general verdict. The only situation in which the introduction of co-conspirator statements might arguably be compared to that in *Jackson* would be where co-conspirator statements are introduced on condition that the foundational requirements later be met, those requirements are not in fact satisfied, and the jury is thereupon instructed to disregard the statements. Since that situation did not occur here, it need not be considered. Moreover, even where that situation does occur, analogy to *Jackson* is weak because the prejudicial impact of a convincing but involuntary confession is far greater than that of out-of-court statements that are shown by the evidence not to have been made by a co-conspirator during and in furtherance of the conspiracy.

Finally, this case presents no occasion for the Court to determine the proper procedure to be followed by a district court where the defendant wishes to present testimony concerning the admissibility of the statements of a co-conspirator but to avoid testifying as to such matters in the jury's presence. Although petitioner now maintains (Pet. 18) that he was not afforded an opportunity to testify "and to present his version or contentions with respect to a lack of the elements necessary to establish a foundation to admit co-conspirator's statements," he made no such request in the district court; nor did he proffer the testimony that he now claims he would have presented. Therefore, this issue

was not properly preserved for resolution on appeal. See Fed. R. Evid. 103(a)(2); see also *Luce* v. *United States,* No. 83-912 (Dec. 10, 1984), slip op. 4.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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OCTOBER 1985

Supreme Court, U.S.
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No. 85-157

OCTOBER TERM, 1985

GARY JACKSON, A/K/A ROE

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

REPLY MEMORANDUM FOR THE PETITIONER

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OCTOBER TERM, 1985

No. 85-157

GARY JACKSON, a/k/a ROE, PETITIONER

v.

UNITED STATES OF AMERICA

REPLY MEMORANDUM FOR THE PETITIONER

Respondent, the United States of America, has not provided in its brief in opposition to the petition for writ of certiorari any basis for declining review in this case. The government does not dispute the conflict arising in the courts of appeals with respect to the matters raised in regard to the issues which the petitioner submits. While the government attempts to distinguish cases, the government does not dispute the sharp division within the courts of appeals concerning the application of confrontation clause to co-conspirator statements and the applicability of the Compulsory Process Clause to compel the attendance of a co-conspirator who is within the United States. The government does not deny that a similar division and uncertainty exists at the state level as well.

Further, the government does not show any reason to decline review with respect to the question as to whether the constitution or the rules of evidence required a hearing on admissibility of co-conspirator statements. The government makes no showing of an absence of conflict in the numerous reported decisions involving co-conspirator statements. 4 D. Louisell & C. Mueller, *Federal Evidence* §427, at 331 (1980).

Finally, the government shows no rational basis to deny review with respect to whether a defendant is entitled to an

opportunity to testify or to present evidence at a hearing on the admissibility of co-conspirator statements. The government neither distinguishes nor shows any lack of importance of such a critical issue. *See, United States v. Ciampaglia,* 628 F.2d 632, 638 (1st Cir. 1980), *cert. denied,* 449 U.S. 1038 (1980) (recognizing that the preponderance test for admissibility of conspiratorial admissions "implicitly anticipated the defendant's evidence would be taken into consideration"). *See also, United States v. Bell,* 573 F.2d 1040, 1043 (8th Cir. 1978); *United States v. Stanchich,* 550 F.2d. 1294, 1298 (2nd Cir. 1977). Certainly, the importance of the defendant's right to an opportunity to tender such evidence to the court without giving up his right to remain silent and without subjecting himself to cross-examination before the jury has been sufficiently serious and of such substantial importance that this court has deemed it necessary to review such matters. *Cf., Simmons v. United States,* 390 U.S. 377 (1968) (search and seizure issues).

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1. In its brief in opposition, the government contends that the petitioner's Confrontation Clause claim does not concern the *admission* of Preston Jackson's out-of-court statements.[1] Indeed, the government argues, the petitioner's claim solely concerns securing Preston Jackson's presence in court. (Br. in Opp. 8). In this way, the government attempts to distinguish *United States v. Inadi,* 748 F.2d 812 (3rd Cir. 1985), *cert. granted,* No. 84-1580 (1985).

The government intimates in stating its first issue for review (Br. in Opp. I) that petitioner made no objection to the government's offer of the declarations of the absent co-conspirator who had not been shown to be at trial. Later in its brief (Br. in Opp. 8), the government states that in order to

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[1]The Brief for the United States in Opposition to the Petition for Writ of Certiorari is hereinafter cited in abbreviated form as "Br. in Opp."

to raise a Confrontation Clause challenge to the admission of a co-conspirator's statement, the petitioner was required to object expressly on Confrontation Clause grounds at trial. Again, the government intimates that no such objection was made at trial.

Contrary to the government's implication, the petitioner made several objections and used other procedures both prior to and during trial in an effort to preserve the defendant's constitutionally guaranteed right to confront his opposing witnesses. Prior to trial, the petitioner filed a request for an evidentiary preliminary hearing to determine the admissibility of co-conspirator's statements (J.A. 22).[2] The magistrate denied the request. Later, petitioner served upon the government a motion for a bill of particulars seeking, *inter alia,* the names and identities of any persons alleged to have been members of the conspiracy (J.A. 19-20). The petitioner also made a motion *in limine* to exclude statements by persons not specifically alleged to be or charged as co-conspirators in an effort to protect the defendant's right to confrontation. (J.A. 72). The petitioner specifically objected to the admission of statements by Preston Jackson and others on grounds that it would deny his right to confrontation. (J.A. 72, 74). The record clearly shows that the government's attorney, petitioner's counsel and the judge engaged in a lengthy discussion about the proper use of Preston Jackson's out-of-court statements. Petitioner's counsel specifically and continuously objected to the introduction of any out-of-court statements by Preston Jackson stating for the record that Presont Jackson was not unavailable but was "in fact in the custody of the United States" (J.A. 103). Thus, contrary to the claim by the government that petitioner did not object to the admission of Preston Jackson's out-of-court statements, petitioner continuously objected to the *use* and

[2] "J.A." hereinafter appears as the abbreviation for the Joint Appendix in the Court of Appeals.

admissions of any of Preston Jackson's out-of-court statements on the basis of the right to confrontation where the witness had not been shown to be unavailable.

In sum, such actions by the petitioner to discover and then to prevent the admission of Preston Jackson's out-of-court statements on Confrontation Clause grounds places this case in a factually analogous situation to that found in *United States v. Inadi, supra.* The record clearly shows, contrary to the government's claims, that petitioner first tried to exclude the *admission* of Preston's out-of-court statements and, after failing in that attempt, tried to secure the witness' presence.

2. Accordingly, the government incorrectly characterizes the petitioner's claim with respect to the infringement of his Sixth Amendment rights of confrontation and compulsory process. (Br. in Opp. 8-9). The petitioner, at trial, on appeal to the Fourth Circuit, and in his Petition for Certiorari, has raised the contention that his rights of confrontation and compulsory process were denied. This denial arose not only from the failure of the prosecutor and the trial court to require Preston Jackson's presence at trial in order to allow Gary Jackson either to confront him or to introduce any favorable defense evidence, but also from the introduction of Preston Jackson's statements against Gary Jackson as vicarious admissions.

The government asserts in its brief that the prosecutor did not refuse to obtain Preston Lee Jackson's presence at trial. The record shows, however, that the government had Preston Lee Jackson in its custody (J.A. 103), and did not choose to produce Jackson at trial, but decided instead to rely on extra-judicial declarations even though the declarant was available. Additionally, the government's brief incorrectly characterizes the posture of the United States Attorney's office in regard to the defendant's request for assistance in obtaining Preston Lee Jackson. The United States Attorney's

office took the position that it would not assist the petitioner and, in fact, refused to do so, compelling the petitioner to seek a formal order for production of the witness whom the defendant desired to confront.[3]

The Supreme Court, in *Barber v. Page,* 390 U.S. 719 (1968), stated that "a witness is not 'unavailable'. . .unless the prosecutorial authorities have made a good faith effort to obtain his presence at the trial." 390 U.S. at 724-725. The court noted that the State there, as United States here, had made no such effort and that the only reason that the witness was not present to testify in person, was because the State did not attempt to seek his presence. The court rightly noted that "[t]he right to confrontation may not be dispensed with so lightly." 390 U.S. at 725. The court further pointed out that the right to confrontation is basically a trial which includes both the opportunity to cross-examine and the occasion for the jury to weigh the demeanor of the witness. 390 U.S. at 725. Neither opportunity was afforded the petitioner, Gary Jackson.

The Court later noted in *Ohio v. Roberts,* 448 U.S. 56 (1980), that the good faith requirement does not require acts in futility by the prosecution. However, the Court did state that "if there is a possibility, albeit remote, that the affirmative measures might produce the declarant, the obligation of good faith may demand their effectuation." 448 U.S. at 74.

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[3]During the course of the presentation of evidence, defendant renewed his prior objection to the introduction of the statements of Preston Lee Jackson, who had not been shown to be unavailable. (J.A. 102). Defendant's counsel argued as follows:

> ". . .with respect to confrontation, the right to confront this Preston Lee Jackson. . .[w]e filed a petition for writ of habeas corpus on Friday; on Friday morning we contacted the U.S. Attorney's office and had a discussion in which we were informed that Preston Lee Jackson was in fact in the custody of the United States; we requested their assistance in obtaining the presence of Preston Lee Jackson at this trial; we were informed that it was Mr. McCollough's position that if we wanted Preston Lee Jackson here to confront him, that we would have to file a petition which we did; he is, I understand, at the correctional institution at Memphis, Tennessee, and we do want to preserve our right to confront him." (J.A. 103).

Certainly the possibility of producing the declarant in the present case was neither nill nor remote, but simply the prosecution's option. Such a situation definitely falls under the *Roberts'* requirement of production.

In effect, the conduct of the prosecution constituted a concealment of the witness. The government's failure to disclose the existence of Preston Lee Jackson *as a co-conspirator* until after jury selection, along with its resistance to the request for assistance and to the subsequently filed petition for writ of habeas corpus ad testificandum, constituted a deliberate attempt to make the witness unavailable for confrontation. Certainly, the failure to disclose Preston Jackson's existence as a co-conspirator, the failure to act on the request for assistance to obtain a person incarcerated in a federal prison and the resistance to the application for a formal order for his production are comparable to the deliberation, the negligence and the other acts resulting in a deprivation of witnesses in *Clark v. Blackburn,* 632, F.2d 531 (5th Cir. 1980); *Freeman v. Georgia,* 599 F.2d 65 (5th Cir. 1979); *Lockett v. Blackburn,* 571 F.2d 309 (5th Cir. 1978), *cert. denied,* 439 U.S. 873 (1978), and *Hernandez v. Estelle,* 674 F.2d 313 (5th Cir. 1981), cases the government seeks to distinguish.

Concomitantly, the failure of the government to assist in the production of the witness denied the defendant the opportunity to question the witness for purposes of preserving the record. The defendant was unable to produce the witness in order to confront him and, similarly, was denied compulsory process to obtain the witness in order to place in the record any favorable or exculatory statements.[4]

Relying upon *United States v. Valenzuela-Burnal,* 458

[4]Even if a showing of favorability of the missing testimony would otherwise be required, fundamental fairness dictates where the government's action denies the petitioner the ability to obtain the evidence and to preserve it in the record, the government should not be allowed to benefit from such action or inaction by then arguing that the petitioner cannot predicate prejudicial error upon the inability to obtain the evidence because the absent witness's testimony is not in the record.

U.S. 858 (1982), the government attempts to assert that some stringent standard of materiality and favorability must be met in order for a criminal defendant to establish prejudicial error on compulsory process grounds. However, the court recognized in *Valenzuela-Burnal,* that because the government action "deprives the defendant of an opportunity to interview the witnesses to determine precisely what favorable evidence they possess. . . the defendant cannot be expected to render a detailed description of their lost testimony." 458 U.S. at 873.

Additionally, the showing with respect to materiality and favorability required un *Valenzuela-Burnal* has no application in cases such as this, where the witness is within the United States and, indeed, was in the custody of the very branch of the United States Government seeking to prosecute the defendant. The majority opinion in *Valenzuela-Burnal, supra,* clearly recognized that the deportation of an alien witness and the corresponding inability to obtain compulsory process for the deported witness who, of necessity, was outside the United States when the objection to his absence was made, is substantially different from the circumstance in which the witnesses are inside the United States. Indeed, with respect to the requirement of a showing of materiality and favorability where the witnesses are out of the country, the court, "in adopting this standard, . . .expr[ed] *no opinion* on the showing which a criminal defendant must make in order to obtain compulsory process for securing the attendance at his criminal trial of *witnesses within the United States,*" 458 U.S. at 873, *n.* 9 (emphasis added).[5]

The government argues additionally that the defendant belatedly filed his application for production of the witness. (Br. in Opp. 10). In contradiction, however, the record shows that the defendant learned of the intention to introduce the statements of Preston Lee Jackson after the jury was selected

[5]Accordingly, review in this case would allow an opportunity for the court to define the standard to be applied in a case where the witnesses were within the United States.

and empaneled on February 22, 1984. (J.A. 69-71, 72). In the statement of facts, the Government's Brief in Opposition to the petition for certiorari acknowledges that, "[a]fter learning that the government intended to introduce the statements of Preston Lee Jackson, who had previously been convicted by the Trial Judge for his participation in the scheme, petitioner also moved for production of statements to be introduced and claimed that failure to furnish them would infringe his Sixth Amendment right to confrontation. (J.A. 80-83)." (Br. in Opp. 6).

When as defense counsel learned that Preston Lee Jackson was "in fact in the custody of the United States" (J.A. 103), the petitioner filed, on Friday, February 24, 1984, a petition for issuance of a writ of habeas corpus ad testificandum seeking the presence of Preston Lee Jackson. All of the defendant's pretrial motions were considered by the trial judge prior to the taking of testimony on the following Monday.

After the trial began on February 27, 1984, "petitioner's counsel again objected to the introduction of Preston's statements and renewed his motion for issuance of the writ." (Br. in Opp. 6). Even if the government's assertion as to timing was correct, such an assertion is not an adequate basis to deny review here.[6]

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[6]The government's argument is circular. The government attacks the defendant's motion and request for issuance of the writ of habeas corpus because, in the government's characterization, the motion stated "in conclusory terms" that Preston Jackson "is a necessary and material witness in this proceding" and that "[t]he [d]efendant . . .cannot proceed to trial in absence of the said witness." (Br. in Opp. 10, *n.* 6 *quoting from* J.A. 50). Yet, the government had the witness in its custody in a federal correctional facility and did not disclose his location until after jury selection. Therefore, the defendant did not have an opportunity to question the witness before filing his application or to produce the witness at trial to insure that his testimony would be placed in the record.

At the time of the filing of the motion, therefore, because of the "position" of the witness and of the government, defense counsel was without an adequate good faith basis to execute an oath or affidavit as to whether the absent declarant's statement was adversarial or exculpatory to defendant. *See, United States v. Valenzuela-Bernal*, 458 U.S. at 874 (stating that the offered testimony should be submitted in verified form attested by defendant or his attorney).

In any event, the defendant was deprived of either his right to confront an adverse witness or his right to compulsory process to produce a favorable witness. It makes no difference under these circumstances whether exculpatory or inculpatory testimony would have been elicited.

3. The government incorrectly analyzes petitioner's argument as to the requirement of a hearing outside of the hearing of the jury on the issue of admissibility of co-conspirator statements and as to petitioner's use of *United States v. James,* 590 F.2d 575 (5th Cir.), *cert. denied,* 442 U.S. 917 (1979), in support of that argument. Petitioner does not rely merely upon the Federal Rules Evidence for the contention that an evidentiary hearing is required before a vicarious admission may be placed in evidence as government contends. Although petitioner urges the court to resolve the conflict among the circuits as to the basis in the evidentiary rules as to whether or not a hearing on the admissibility of co-conspirator statements should be conducted, petitioner does not assert the conflict between *James* and the decisions in other circuits as *the* basis upon which review should be predicated.

While the *James* decision rests upon the Federal Rules of Evidence, petitioner also relies upon a portion of the reasoning in *James* that "co-conspirator's declarations in a conspiracy trial. . . pose problems precisely because [of their materiality] to demonstrate the constitutional implications of the regulation of such evidence. This type of evidence endangers the integrity of the trial because the relevance and apparent probative value of the statements may be...highly prejudicial..." *Id.* at 579 (emphasis added). Accordingly, due process considerations requrie that evidence bearing upon the admissibility of the statements of co-conspirators should be received outside the jury's presence. *Jackson v. Denno,* 378 U.S. 368, 376-77 (1964); *Simms v. Georgia,* 385 U.S. 538, 543-544 (1967).

The government's argument, therefore, shows no reason for denial of review upon these basis. Indeed, this case provides an opportunity to delineate the due process requirements with respect to admissibility of vicarious admissions as well as coerced admissions as in *Jackson.* The government's argument that the prejudicial impact of an involuntary confession heard by the trier of fact is greater than the vicarious

admissions of a co-conspirator is supported neither in logic, by empirical evidence, nor in law. *See, e.g., United States v. James,* 590 F.2d at 579; *Kessler,* "The Treatment of Preliminary Issues of Fact in Conspiracy Litigation: Putting the Conspiracy Back Into the Co-conspirator Rule," 5 Hofstra L. Rev. 77, 79 (1976).

Finally, the government's argument that this case does not present an occasion for the court to determine the type of procedure for the trial court to follow where a defendant wishes to present testimony concerning the admissibility of statements of co-conspirators but to avoid testifying as to such matters in the jury's presence is patently incorrect. Moreover, the government's argument that the defendant did not make a request to do so in the District Court is also patently incorrect. The defendant filed a motion requesting a hearing outside the presence of the jury on the issue of admissibility substantially prior to trial, which the magistrate denied without affording a hearing (J.A. 23) and which the trial court upheld without affording a hearing (J.A. 70, 72).

Accordingly, this court should determine the propriety of either conducting such a requested hearing, which allows the defendant an opportunity to place his evidence before the court without subjecting himself to cross-examination before the jury, or denying that request without affording any opportunity to be heard. *Compare, Simmons v. United States,* 390 U.S. 377 (1968).

CONCLUSION

For these reasons and those set out in the petition, it is respectfully submitted that the petition for writ of certiorari should be granted.

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